

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

September 8, 1998

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**No. 97-0871**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**IN RE THE PATERNITY OF MATTHEW SHAWN K.D.:**

**SHAWN MICHAEL D.,**

**PETITIONER-RESPONDENT,**

**V.**

**TRACY K.,**

**RESPONDENT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL P. SULLIVAN, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Tracy K., the mother of Matthew Shawn K.D., appeals from a judgment granting sole custody and primary physical placement of Matthew to his father, Shawn D. On appeal, Tracy contends that the trial court erred both in finding that a substantial change of circumstances had occurred, and

in concluding that modification of placement was in the best interest of Matthew. We affirm.

## **I. BACKGROUND**

Matthew was born on August 31, 1991, to Tracy. Tracy did not list Shawn as the father on Matthew's birth certificate. On January 13, 1992, Shawn filed a Petition for Adjudication of Paternity. Thereafter, a stipulation and an order were entered, establishing (1) that Shawn was Matthew's father, (2) an obligation on his part to pay child support, and (3) limited visitation rights with Matthew. The stipulation and order also granted sole custody and primary physical placement of Matthew to Tracy.

In 1995, Tracy began a pattern of withholding Matthew from Shawn, in violation of the stipulation and order. Shawn then moved the trial court to find Tracy in contempt and to increase the amount of visitation with his son. At the hearing on the motion, Tracy alleged that Shawn had sexually abused Matthew. In response to this allegation, the trial court restricted the visitation between Shawn and Matthew to supervised visits, appointed a guardian ad litem for Matthew, and appointed psychologist Joseph Collins, Ed.D., to evaluate Shawn, Tracy, and Matthew. After the completion of the evaluations, Shawn filed an Order to Show Cause for Modification of Custody and Placement, in which he alleged a substantial change in circumstances warranting his request for sole custody and primary physical placement of Matthew. Following a three-day contested hearing, the trial court awarded sole custody and primary physical placement of Matthew to Shawn. Tracy now appeals.

## II. ANALYSIS

Orders determining legal custody and physical placement may be revised two years or more after an existing order is entered if the trial court finds that the "modification is in the best interest of the child" and "[t]here has been a substantial change of circumstances since the entry of the last order affecting legal custody or the last order substantially affecting physical placement." Section 767.325(1)(b)1, STATS.<sup>1</sup> Our review of a trial court decision modifying child support, custody, or placement is limited to whether the trial court erroneously exercised discretion. *See Krause v. Krause*, 58 Wis.2d 499, 508, 206 N.W.2d 589, 594 (1973). If the trial court has “exercised its discretion on the basis of [the] facts of record, employed a logical rationale and committed no error of law,” then this court will affirm its decision. *Licary v. Licary*, 168 Wis.2d 686, 692, 484 N.W.2d 371, 374 (Ct. App. 1992).

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<sup>1</sup> Section 767.325(1)(b), STATS., provides, in relevant part:

(b) *After 2-year period.* 1. Except as provided under par. (a) and sub. (2), upon petition, motion or order to show cause by a party, a court may modify an order of legal custody or an order of physical placement where the modification would substantially alter the time a parent may spend with his or her child if the court finds all of the following:

- a. The modification is in the best interest of the child.
  - b. There has been a substantial change of circumstances since the entry of the last order affecting legal custody or the last order substantially affecting physical placement.
2. With respect to subd. 1., there is a rebuttable presumption that:
- a. Continuing the current allocation of decision making under a legal custody order is in the best interest of the child.
  - b. Continuing the child’s physical placement with the parent with whom the child resides for the greater period of time is in the best interest of the child.

The trial court found that a substantial change in circumstances had occurred between the original order, as modified, and the time of the hearing. The court found that Tracy had continually attempted to disrupt Shawn's visitations with Matthew. In addition, the court found that Tracy had raised false accusations of inappropriate sexual contact between Shawn and Matthew. These circumstances were recent developments; the accusations of child sexual abuse came about after the entry of the modification of the original order. The disruption of Shawn's visitation rights was also based on events occurring after the modification.

In order for the trial court to determine that a substantial change took place, it must compare the facts at the time of the original order to the facts as they are at the time of the hearing, and it must determine that the change is sufficient to justify modification. *See Licary*, 168 Wis.2d at 692, 484 N.W.2d at 374. In this case, the evidence supported the trial court's finding that the facts and circumstances had substantially changed since the time of the original order.

Clearly, the trial court was also correct in concluding that the changes were sufficient to justify granting sole custody to Shawn. The trial court found that joint custody was not feasible due to Tracy's interference with Shawn's legitimate visitations. It also found that Tracy would not cease interfering with Shawn's visitation rights unless custody was transferred to Shawn. In light of these findings, the trial court's conclusion that a substantial change in circumstances had occurred was not erroneous.

Tracy also contends that placing Matthew in his father's custody is not in the child's best interest. In this case, the trial court found that Matthew's best interests would be served by awarding custody to a "loving, caring" father.

This finding is supported by the evidence, including the opinion of Dr. Collins that Matthew responded to his father's discipline, while ignoring his mother's behavioral demands, Tracy's statements that she did not speak to Shawn unless "absolutely necessary," and Shawn's willingness to allow Tracy to take an active role in Matthew's life, as compared to Tracy's unwillingness to do likewise. Clearly, with the support of this evidence, the trial court made a determination within the bounds of its discretion. We will not, in these circumstances, substitute our judgment for that of the trial court. *See Steinbach v. Gustafson*, 177 Wis.2d 178, 185, 502 N.W.2d 156, 159 (Ct. App. 1993) (We will not reverse a trial court's discretionary determination if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision.).

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

